

LAZARO MENDIETA

IBLA 90-143, 90-144, and 90-145

Decided July 6, 1993

Appeals from a decision of the Jordan, Oregon, Resource Area Manager, Bureau of Land Management, rejecting the arguments in two protests of BLM activities tantamount to road closures and a protest of the application of a wilderness study area boundary determination, and dismissing the protests.

Dismissed.

1. Rules of Practice: Protests

Only an objection to an action proposed to be taken by BLM is cognizable as a protest under 43 CFR 4.450-2. An objection filed after BLM has taken action is an untimely protest. BLM properly dismisses a protest of an action that is not proposed to be taken but has already occurred.

APPEARANCES: Eric Twelker, Esq., and William Perry Pendley, Esq., Denver, Colorado, for appellant; Donald P. Lawton, Esq., Office of the Regional Solicitor, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Lazaro Mendieta has appealed an October 24, 1989, decision letter of the Acting Resource Area Manager, Jordan, Oregon, Resource Area, Bureau of Land Management (BLM), dismissing two protests of BLM actions that closed roads because the actions had been completed and rejecting a third protest of the application of a wilderness study area (WSA) determination. We consolidated his three appeals for decision on review because the facts and issues are similar.

Appellant is a rancher in eastern Oregon. On September 5, 1989, he filed protests with BLM of its actions closing two roads he used to tend the cattle he grazed under BLM grazing permits and a protest of a change of the boundary of a WSA that deleted a road. BLM's decision sets forth the reasons for its actions:

Related to your first protest of the closure of a temporary road leading to a horse trap within the Saddle Butte WSA. Our maintenance crews obliterated this temporary road during the week

IBLA 90-143, etc.

of August 28, 1989 as provided for under the environmental assessment (OR-030-7-4) that was completed on April 28, 1977, and supplemental EA (NO. S-1-36) completed on September 11, 1981 for the development of that horsetrap. The restoration of the temporary road was[,] therefore, a part of and condition to the original project which provided for the construction of the road. Since this project was a post FLPMA [Federal Land Policy and Management Act] temporary development, our Interim Management Policy and Guidelines for lands under wilderness review requires that all temporary post FLPMA developments be reclaimed prior to October 21, 1991. In Oregon, a "reclamation deadline" has been set at September 30, 1990. In order to have the temporary road and horsetrap reclaimed by this date it was imperative that the work be completed in fiscal Year 1989.

Related to your second protest concerning the closure of a way running south from the Sand Springs Cow Camp. This way was identified as such in the Final Wilderness Inventory for Oregon and Washington in November 1980. It is wholly within WSA 3-110 (Lower Owyhee Canyon) and is subject to the Interim Management Policy and Guidelines for lands under wilderness review which do not permit a way to be maintained by mechanical means. On June 1, 1988, a BLM employee while on a resource patrol discovered that this way had recently been bladed. It was later determined that while maintaining a road "cherry stemmed" out of the WSA, Lazaro Mendieta had continued the maintenance into the WSA on this way. This "intrusion" had to be reclaimed as discussed earlier in this letter by pulling the berms back into the center and reseeding the disturbed area to allow it to revegetate to the condition it was in prior to Mr. Mendieta's blading. It should be noted that Mr. Mendieta, Mr. Lequerica, Mr. Dowell and Mr. Fillmore still have full access to the Sand Springs Cow Camp. The way in question was a "short cut" seldom used and in fact only passable by four wheel drive due to a very steep rocky section.

Since reclamation of the intrusion on the Sand Springs way and the rehabilitation of the Saddle Butte Horse Trap and temporary road had already been completed prior to receiving your fax on September 5, 1989, they are not protestable actions. 43 CFR Section 4.450-2 only provides for the protest of actions proposed to be taken, not those already completed.

The third protest dates to the correction of an error concerning the deletion of a temporary road in Saddle Butte Wilderness Study Area. On April 18, 1989[,] at your request, this office responded to your questions and concerns regarding this correction. Please refer to our response on that date.

(Decision at 1-2, Oct. 24, 1989).

The April 18, 1989, letter referred to at the conclusion of BLM's decision referred in turn to a February 21, 1989, letter from the State Director, BLM, to appellant's counsel. That letter responded to counsel's inquiry about the status of the road leading to the horsetrap, concluding:

The route in question was mistakenly identified as a pre-FLPMA road during the wilderness inventory completed in 1980. The error was discovered in the early 1980s and the pertinent maps and documents in the Vale District were corrected. The road does not appear on the WSA map published in the April, 1985 Draft Wilderness EIS.

To this counsel replied on March 7 that he saw

no disagreement with any contention that the road was marked as "cherry-stemmed" on the published and public documents of the BLM. The gist of your letter seems to be that a low level BLM employee in the Vale Office closed this road and un-"cherry-stemmed" it by simply erasing it from some maps.

The State Director's April 18 answer stated:

[T]he only public document in which this temporary road was represented as a "cherry-stem" was that associated with the wilderness inventory decision in 1980. None of the other documents associated with this WSA, such as the supplement to the EA prepared in 1981, the study portion of the case file, and the Draft Oregon Wilderness EIS represented the route as a "cherry-stem", and in fact they indicated that this is a temporary route. Your assumption that a "low-level" employee of BLM closed the route by "erasing it from some maps" is incorrect. This route has not been erased from any map. Notations in the official case file map for this WSA which illustrate this route indicate that it was constructed post-FLPMA. Our letter to you of February 21, 1989 explains the inventory error that was associated with this route. As was explained in that letter, the EA for the project (a public document) identified the temporary nature of the horse trap and road and the need for their reclamation.

Appellant states that "[b]ased on statements of BLM personnel, I became concerned that the two above mentioned roads would be closed. I wished to protest those closures, so I orally requested that the BLM issue a decision that I could appeal" (Statement of Reasons, Exh. 1 at 2). The Area Manager relates:

[I]n September of 1988[,] Tom Dew, Jordan Resource Area Outdoor Recreation Planner[,] and I met with Lazaro Mendieta and other ranchers to clean up trash and litter near the Sand Springs Cabin, and after the cleanup activity was completed, Tom and I discussed a number of land management issues with Mr. Mendieta and the other

livestock operators, including (1) the Interim Management Policy (IMP) Activity Report on the unauthorized blading, (2) the need to restore the way [in section 30, T. 29 S., R. 41 E.] to comply with IMP guidelines, (3) whether the way should be closed on a temporary or permanent basis to permit revegetation and (4) whether Mr. Mendieta would contribute to the cost of restoration.

(BLM Answer, Exh. D at 1). The Area Manager also relates that he believes he discussed reclamation of the Saddle Butte horsetrap road at the same meeting and that he "never agreed to issue a decision concerning the restoration of the disturbance on the Sand Springs Way or the reclamation of the Saddle Butte horsetrap road." Id. at 2.

BLM concludes that:

Mr. Mendieta received notice from BLM during meetings as early as September 1988 of the intent to restore the subject roads. * * * In addition, the public was provided notice of the fact that this road was no longer cherry-stemmed in the Bureau's wilderness inventory by the April 1985 draft Environmental Impact Statement and by the subsequent Supplement to the draft published in January of 1987. [1/] Notwithstanding this notice * * * Mr. Mendieta failed to file a protest until September 5, 1989, a date after the road restoration work had been completed and correction in the boundary to the WSA had been in place for over four years. Actions of the BLM which are no longer proposed but which have been taken may not be the subject of a protest. * * * BLM respectfully urges that the present matter be dismissed on procedural grounds.

(BLM Answer at 5-6).

[1] We agree. 43 CFR 4.450-2 provides: "Where the elements of a [private] contest are not present, any objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." We have held that only an objection to an action proposed to be taken by BLM is cognizable as a protest under 43 CFR 4.450-2. George Schultz, 94 IBLA 173, 177 (1986). An objection filed after BLM has taken action is an untimely protest. Everett J. Johnson, 95 IBLA 136 (1987). BLM properly dismisses a protest of an action that is not proposed to be taken but has already occurred. Willamette Logging Communications, Inc., 86 IBLA 77, 80 (1985); Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 318, 92 I.D. 37, 41 (1985). Appellant's oral objection to BLM in 1988 before it restored the roads does not constitute filing a protest. His September 5, 1989, letters objecting to

1/ See BLM Answer, Exh. M at 203, 205; Exh. N at 299.

BLM's actions in closing the roads and in correcting the boundary of the Saddle Butte WSA were properly dismissed by BLM. 2/

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals from BLM's October 24, 1989, decision are dismissed.

Will A. Irwin
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

2/ We note BLM states in its Answer:

"During restoration [of Sand Springs way], some large rocks were left in the way to impede traffic as an aide [sic] to the rapid restoration of the way to meet the reclamation requirements contained on page 31 of the Interim Management and Guidelines for Lands Under Wilderness Review, BLM Manual Handbook H-8550-1. * * * The BLM believes that these rocks can be easily removed from the way by hand or with a truck winch once the vegetation on the way has reestablished itself. Although the way has been effectively made impassable to vehicle on a temporary basis, this step was necessary because of the actions of the appellant in violation the IMP requirements for the wilderness study area less than two years before the reclamation deadline. There was no intent by the BLM to in any way permanently close this way to future traffic."

(Answer at 9-10).